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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 412

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNIONS NOS. 338 and 680, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT, MILK DRIVERS AND DAIRY EMPLOYEES, LOCAL UNION 680, IN OPPOSITION.

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I.

Questions Presented.

At the ultimate hearing of an appeal in this matter, should there be one, Local 680 will urge that the following questions are presented in this matter for determination:

1. Is it an unfair labor practice, under Section 8(b)(4) of the Labor Management Relations Act of 1947, for the union to request employees who are under contract with it

to refrain from purchasing goods produced by an employer with whom it is engaged in a labor dispute?

2. Is it an unfair labor practice for the union to inform its members that it has made such a request of their employers, provided it does not request or instruct its members to refuse their employers' instruction to handle the product?

3. Is a refusal to handle products by one employee of an employer a "concerted" refusal, as defined by Section 8(b)(4)? Is such a refusal by one employee of each of two or more employees a "concerted" refusal?

4. Does an unauthorized refusal to handle products, on the part of one employee, which refusal is terminated by instructions of the union as soon as the union learns about it, constitute a violation of Section 8(b)(4) of the Act?

5. Is a threat by a union to an employer under contract with it that its members will refuse to handle "hot cargo" a violation of Section 8(b)(4) if the threat is never communicated to the employee-members of the union?

6. In the light of the evidence in this case, is the respondent Local 680 guilty of a violation of Section 8(b)(4) of the Act?

The foregoing questions are all at issue in this case. However, from the point of view of the petition for certiorari, and in the light of the opinion of the Court below, it would seem that the questions presented upon this application can be simply stated as follows:

Whether, under the provisions of a collective bargaining contract which grant to employees the right to refuse to

handle products of a company with which the union is in dispute, it is a violation of Section 8(b)(4) of the Act for the union to notify its member-employees of the employer that the union has requested their employer not to purchase the products of a company which is in dispute with the union, and to request them not to handle the products of that company.

ARGUMENT.

We shall, should this matter come to a hearing upon certiorari, argue, *inter alia*, that there was no "union inducement of employees not to handle products" as alleged by petitioner on page 2 of its brief under "QUESTION PRESENTED." However, because this presents a factual question which would require a review of the record, we adopt the statement of the "QUESTION PRESENTED" as last set forth, solely for the purpose of this argument in opposition to the petition now before the court.

We maintain that even if the union did induce its members not to handle said products, this inducement, under the circumstances of this case, is not a violation of section 8(b)(4) of the National Labor Relations Act, as amended, and that this proposition is so crystal clear that we respectfully request the court to deny the petition for a writ of certiorari, unless upon a reading of the record the Court desires to enter a *pro forma* affirmance of the Court below.

Counsel has read the Brief for Respondent in Opposition on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in Case No. 273 of the October Term, 1957, of this Court and

is in accord with and adopts the reasoning set forth therein. We shall not burden the Court with a repetition of the arguments contained therein. We join in the similar request that this matter be disposed of by a *per curiam* decision affirming the decision of the Second Circuit Court in the instant case and affirming the decision of the District of Columbia Circuit Court in the *Local 886* case.

In the case *sub judice*, the Second Circuit has held that a hot cargo clause in a collective bargaining agreement is not a violation of Section 8(b)(4) of the Act and that under this type of clause the union may induce its members not to handle the hot cargo. The Court reasons that: (1) a hot cargo clause obtained by negotiations between company and union is not coercion within the meaning of the Act, and (2) the exclusion of certain types of work in the collective agreement removes said excluded work from the "course of employment."

The Court of Appeals for the District of Columbia Circuit has made a similar ruling involving petition No. 273 involving Local 886.

In *National Labor Relations Board v. Local 1796, United Brotherhood of Carpenters*, 241 F. 2d 147, there was a collective bargaining agreement which contained the following provision: "Workmen shall not be required to handle non-union material." The crucial question was whether such a provision justified a union-induced work stoppage of the employees when the employer desired its employees to perform work on "non-union material." The Ninth Circuit Court of Appeals ruled that the union was guilty of an unfair labor practice within the meaning of 8(b)(4)(A) of the Act.

In discussing the *Local 1796* case, the Ninth Circuit Court of Appeals says:

> "An employer may well remain free to decide, as a matter of business policy, whether he may accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement."

Thus, the Ninth Circuit holds that the employer may lawfully refuse to handle hot cargo but after signing the agreement the employer may refuse to honor the "hot cargo" clause. In other words, the Ninth Circuit has indicated that an employer may refuse to handle hot cargo without violating public policy. Yet, the union, which is a signatory party to the agreement, is allegedly guilty of an unfair labor practice if it induces the company employees to refuse to perform *work which the company may legally refuse to have performed and which work said company has agreed shall not be performed* by the employees concerned. Such a proposition is untenable on its face.

Aside from this, a reading of section 8(b)(4) of the Act establishes that this section of the Act has no application because the collective bargaining agreement has removed "hot cargo" from "the course of employment."

However, even aside from the interpretation of this phrase in the statute, and even if it were absent from the statute, the handling of "hot cargo" is, by contract, excluded from, and is not part of the employment here considered.

This Court in *J. I. Case Co. v. National Labor Relations Board*, 321 U. S. 332, 64 Sup. Ct. 576 (1944), had occasion to examine the consequences and legal effect of a collective

bargaining agreement and held that the individual contract of hiring must yield to the collective agreement because collective bargaining "results in an accord as to terms which *will govern hiring and work and pay in that unit.*"

Thus, if the collective agreement excludes certain categories of work, those categories are no longer within the course of employment and there can be no violation of Section 8(b)(4) of the Act, which involves a refusal, concerted or otherwise, to perform work *which is not a part of the employment.*

We wish respectfully to emphasize that this argument prevails, and is an effective bar to prosecution under Section 8(b)(4), whether or not we define "course of employment" as did Chairman Farmer of the N. L. R. B. in *Pittsburgh Plate Glass*, 105 N. L. R. B. 740 (1953), or as Chairman Farmer defined the same phrase when he reversed himself in the *Sand Door & Plywood Co.* case, 113 N. L. R. B. 1210 (1955).

We submit that *irrespective of the wording of the Act, and of the interpretation of the phrase "course of employment" as contained in the Act*, where, *by a contract of collective agreement*, an employer and employee or a group of employees, expressly exclude a certain type of work from the duties of the employee, that work is outside the area of the duties of the employees. *The employee has no right to perform that work and therefore has the right to refuse to perform the duties.*

Since the N. L. R. B. accepts the validity of a "hot cargo" clause, a denial of the validity of a refusal to do "hot cargo" is, we submit, a contradiction in terms, and is utterly without support in law or logic.

We have stressed this point because it does not seem to have been referred to with sufficient emphasis by the brief for the respondent in opposition to the application for certiorari in the *American Iron & Machine Works* case, (*N. L. R. B.* v. *General Drivers Local No. 886*, Case No. 273, October term, 1957).

In other respects the brief of the respondent in that case (*American Iron Works*, *supra*) so fully expresses our point of view that we do not wish to burden the Court by a repetition of what was there said.

We therefore respectfully refer to and rely upon the arguments of counsel for the respondent in *American Iron Works*, *supra*, and also of counsel for Local 338 in the present proceedings as a further basis for our contentions that the application presently made for certiorari should be denied.

Conclusion.

For the reasons heretofore set forth and for the reasons stated by counsel for respondent Local 338, as well as counsel for respondent in *American Iron Works*, *supra*, the union did not violate Sections 8(b)(4) of the Act and it is respectfully requested that either this application for certiorari be dismissed or, preferably, that the decision of the Court below be affirmed without the delay occasioned by further hearing.

Respectfully submitted,

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By THOMAS L. PARSONNET.